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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

OPPOSITION OF GTE

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TABLE OF CONTENTS

SUMMARY

Because the Congress found and the Commission correctly affirmed that the exclusionary power of the cable industry is not solely a function of the degree or geographic extent of the industry's affiliation with program suppliers, blanket exemptions from the program access rules based on minimal operator/programmer affiliation are not warranted. Assuring access to programming by alternative multichannel video distributors is important for minority, informational/educational and other special offerings, not just for conventional entertainment material. Public-interest determinations, under Section 628 or by general waiver authority, can provide for exceptional cases without the need for blanket exemptions.

Section 628 is sufficiently ambiguous on the question of presumption of harm -- particularly as between subsections (b) and (c) -- that the Commission would do well to clarify its reasoning in advance of the first adjudications of program access complaints. The statute is clear, however, on the limits of grandfathering for exclusive or otherwise discriminatory programming contracts between cable operators and program suppliers, and the Commission should keep its rules conformed to the law.

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and Diversity in Video Programming	)	
Distribution and Carriage	)	

OPPOSITION OF GTE

GTE Service Corporation ("GTE"), on behalf of the GTE Domestic Telephone Operating Companies and GTE Laboratories Incorporated, hereby opposes several of the petitions for reconsideration of the First Report and Order in the above-captioned proceeding, 8 FCC Rcd 3359 (1993).[1] In a Reply of February 16, 1993, GTE explained its interests in program access as those not only of a future video delivery alternative to conventional cable systems but also of a prospective creator and/or packager of innovative programming, including interactive and multimedia offerings.

In these roles, GTE will depend on new programmers having products and services they wish to carry on GTE networks. It must also rely on the willingness of conventional cable and other existing delivery systems to transport innovative GTE offerings. Accordingly, as discussed below, GTE opposes the

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[1] Among the petitioners are Black Entertainment Television, Discovery Communications, Liberty Media, National Rural Telecommunications Cooperative, Time Warner Entertainment, Viacom International and Wireless Cable Association. Notice of receipt of the petitions was published at 58 Fed.Reg.34800, June 29, 1993.

exemption from or relaxation of cable operator/affiliated programmer constraints sought variously by Viacom and four other cable-owned programmers.

The Commission correctly found that the exclusionary power of the cable industry is not solely a function of programmer affiliation.

Among other requests, Viacom asks to be exempted from the "program access rules" on the ground that commonly-owned cable systems account for fewer than 5% of subscribers to Viacom cable programming services. The request springs, in part, from the Commission's announced willingness to examine data supporting "exemption from our attribution standards" for vendors whose cable relationships are so slight as to make them unlikely to favor cable operators over alternative video delivery companies.[2]

The statute and the rules adopted in the First Report and Order are predicated on the general power of cable as a national industry rather than on the degree of its influence in particular geographic markets. The agency reasoned as follows:

> Although some parties claim that programming vendors would not have the incentive to engage in the prohibited practices in markets where they are not vertically integrated, we believe that the legislative history demonstrates Congress' concern that vertically integrated vendors may control programming access in areas without a commonly owned distributor. 8 FCC Rcd at 3370.

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[2] 8 FCC Rcd at 3371, n.19. While Viacom cites the footnote in asking for exemption from the totality of the "program access rules," the Commission only promised to look at relief for slightly-affiliated vendors from a single aspect of those rules, the "attribution standards." These standards bear on the question of vertical integration for purposes of 47 U.S.C.§628(c), but an independent statutory basis for regulation of Viacom under program access rules remains in Section 628(b). As the Commission concluded, Viacom would be subject to subsection (b) as a cable operator, even if it were to gain exemption from those restrictions in subsection (c) applicable to vertically-integrated satellite cable programmers. 8 FCC Rcd at 3369-70.

Previously, Viacom itself testified to the general and national power of cable operators to influence the behavior of programmers, unaffiliated as well as affiliated:

> Notwithstanding the entry of new technologies, cable operators still control access to the overwhelming number of subscribers and use the bargaining power this creates to obtain low license fees from program services.[3]

If the Commission has correctly interpreted Congressional concern that cable's anti-competitive incentives exist independently of programmer affiliations in particular geographic markets -- and GTE believes the First Report and Order is correct -- it would be inconsistent to adopt an exemption, such as Viacom seeks, based on perceived attenuation of influence. If programmers have incentives to engage in prohibited practices even as to non-affiliated systems, *a fortiori* those incentives remain for affiliated systems. Likewise, by Viacom's own witness, if cable today has the power to compel lower program license fees from non-affiliated programmers, to relieve affiliated programmers from rules aimed at checking the power seems contra-intuitive.

The economic analysis attached to the Viacom petition purports to show that a program vendor's discrimination in favor of cable carriage, by refusing to supply programming to alternative delivery systems, does not become profitable -- even where affiliated cable systems account for 50% of vendor subscriptions in a given market-- unless and until 30% of alternative system viewers are shifted to cable.[4] The study's authors find a viewer shift of that magnitude "unlikely." *Id.*

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[3] Comments, January 25, 1993, 56-57.

[4] Crandall & Glassman, 10, Table 1.

If extended to its maximum, the analysis thus appears to justify exemption for any vertically-integrated satellite program vendor whose commonly-owned cable systems account for as much as 50% of the vendor's subscribers. Even at this level, say the authors, refusal to sell programming to alternate video delivery systems would remain unprofitable unless the vendor controlled enough programming (50%) to be able to siphon away 30% of the alternate system's customers. Since no vendor presently possesses such control, according to the authors, the only rational course for the profit-maximizing vendor is to sell to the alternate system.

At the end of the Viacom analysis, one is left wondering what all the fuss in Congress was about. Witness after witness representing alternative delivery systems claimed to have been denied access to the programming of vendors not meeting the 50%/30% criteria discussed above.[5] Plainly, legislators did not find the exclusionary conduct irrational, but rather treated it as the predictable

The Viacom analysis appears to assume that, in the integrated company made up of satellite vendors and cable operators, the vendors are free to maximize their profits without objection from -- or over the objections of -- the operators. It assumes that commonly-owned cable operators will acquiesce in the vendors' care and feeding of alternate-delivery competitors. Whether that assumption is correct will depend on whose profits count for more in the overall company -- those of the operators or of the vendors. But no such analysis is offered in the Viacom study.

Again, Viacom's earlier comments about its dependence -- any programmer's reliance -- on cable systems as purchasers and deliverers of video entertainment programming should give the Commission pause. Until

Where the desired exceptions are not covered under (c)(4)'s focus on exclusivity, waiver of the rules could be sought under 47 C.F.R.§1.3.

Similarly, public-interest determinations should be relied on to build up a case-by-case repository of judgments on minority, educational, informational and other special categories of new programming.

Black Entertainment Television ("BET") and Discovery Communications seek exceptions from the program access rules based on the value of the minority and educational/informational programming they provide, and the difficulties such offerings face in securing financing and viewership. GTE has no great quarrel with either point, but must also look to the statute's encouragement of alternative means of video delivery, such as telephone companies are poised to offer.[7]

Unlikely as it may seem to BET and Discovery that the programs they struggle to market today would ever be foreclosed from alternate delivery, GTE can foresee a time when cable's market power might force exclusive contracting for the more popular of these services to the detriment of non-cable media. Accordingly, rather than blanket exceptions to the program access rules, it would be preferable at this time to give alternative media the opportunity to comment, in a public-interest proceeding, on the pros and cons of exclusive contracts where minority, educational and informational programming is concerned.[8]

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7 House-Senate Conference Report, H.R.102-862, 102d Cong., 2d Sess., 93.

8 Discovery and Liberty Media quarrel with the low level (5% equity) of the operator/programmer attribution standard, and BET says that using the same threshold as for telephone/cable affiliation under video dialtone [Second Report and Order, 7 FCC Rcd 5781 (1992)] is not appropriate because the latter proceeding had nothing to do with "diversity of viewpoints." (Petition, 5) GTE has argued for a higher affiliation threshold in 1992 Cable Act and video dialtone rulemakings. In no case, however, should the standard be changed in one place and not the other. As for diversity of viewpoints, that policy objective is written all over the video dialtone Second Report and Order. The distinctive characteristic of video dialtone systems as against conventional cable networks is their openness to any and all customer/programmers.

To the extent that the exceptional treatment BET and Discovery desire goes beyond exclusive contracting and thus falls outside Section 628(c)(4), public-interest determinations would be available under the Commission's general waiver authority.

The Commission should clarify its reasoning on presumption of harm.

Liberty Media (Petition, 3-8) disagrees with the FCC's conclusion that a claim of program access violation under Section 628(b) must make a threshold showing of harm (Order, ¶12) but is not required to do so under Section 628(c). (Order, ¶¶47-49) While GTE does not accept all of Liberty Media's argument, it believes the point requires some clarification.

The conclusion reached by the Commission can be construed in two ways. As Liberty Media reads the Order, the Commission may be saying that Section 628(c)(2) lists *per se* violations of the Act which are strictly prohibited.[9] Support for this interpretation can be found at paragraph 48 of the Order which states that "a legislative determination was made that there was sufficient potential for harm that the specified unfair practices should be prohibited." An alternative construction is that Section 628(c)(2) specifies conduct which creates a rebuttable presumption of harm. Support for this construction is found in the Commission's statement that it "will not impose a *threshold* burden of demonstrating some form of anticompetitive harm on a complainant alleging violation of Section 628(c)."

the Commission is justified in reaching either conclusion, and its choice is entitled to judicial deference.[10]

Liberty Media has attributed the first construction to the Commission and proceeds to attack the Commission for ignoring limits on standing to file complaints under Section 628. (Petition, 5) By focusing on the definition of "aggrieved party" in *Panhandle Producers & Royalty Owners Ass'n v. Economic Regulation Ass'n*, 847 F.2d 1168, 1173 (5th Cir. 1988), however, Liberty Media has confused judicial standing with standing to appear in an administrative

The alternative reading of the Commission's Order would also result in standing for complainants but would not result in *per se* violations.[11] The language of subsection (b) and of Section 628(d) on complaint procedure suggests Congress anticipated a common approach to both sorts of claims, the only difference being that (c) specifies the "minimum contents of regulations" for conduct described only generally in (b). If (c) is read as an irreducible core and subset of (b), it makes sense to equate the proofs required under each part. Accordingly, complainants ultimately would be called upon to demonstrate that they have been harmed -- pursuant to (b) -- by unfair or deceptive methods, acts or practices "the purpose or effect of which is to hinder significantly or to prevent" claimants' provision to subscribers or customers of satellite-delivered programming. Alleged violations of subpart (c), however, would establish a rebuttable presumption of harm for the specified conduct, whereas alleged violations of subpart (b) would require that some harm be demonstrated.[12]

Liberty Media would go further, asserting that complainants must not only allege harm but must prove their entire case at the outset. Otherwise, claimants are subject to dismissal for lack of standing. (Petition, 5) This is too strict an interpretation. The law does not require an aggrieved party to plead fully at the beginnning what it is required to prove in the end. On its face, Section 628(d) allows a distributor to "commence an adjudicatory proceeding at the Commission" by claiming that it is "aggrieved by conduct that it *alleges*" violates subsections (b) or (c). (emphasis supplied)

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[11] It would appear under either construction of Section 628 that exclusive contracts for distribution to persons in areas not served by a cable operator are *per se* violations pursuant to Section 628(c)(2)(C).

[12] The FCC order, at ¶12, states that complaints lacking a threshold showing of harm "will not go forward."

It ought to be sufficient for the allegation to show some connection between the alternate distributor and the operator or programmer defendant(s). For example, a complaining distributor should show that defendants refused program access or fair program terms to the complainant in particular. For these purposes, there appears to be no bar in the statute to FCC rules that "presume" harm for purposes of causing the defendants to respond. If they are able to rebut the presumption, and if claimant cannot in the end overcome the rebuttal, the complaint would not succeed.

Based on the foregoing, the Commission should clarify whether its construction of Section 628(c) establishes *per se* violations or simply a rebuttable presumption of harm. Either conclusion is reasonable under the ambiguous provisions of Section 628. The criticisms of Liberty Media are unfounded or inapposite. At the very least, harm is to be presumed in program access complaints under Sections 628(b) or (c), so long as the claims are sufficiently specific to the complainant. To be granted relief, however, a claimant must prove that a purpose or effect of defendants' conduct was to prevent or significantly hinder distribution of satellite programming to claimant's subscribers or consumers.

The Commission correctly decided to limit grandfathered exclusivity to the terms of the statute.

Time Warner Entertainment ("TWE"), among several requests for relief, asks that existing contracts executed before the effective date of the program access rules be grandfathered and excused from compliance with Section 628. GTE's Reply, at 7, explained that Congress' choice of June 1990 as the statutory grandfathering date must be taken as strong indication that the legislators considered parties contracting thereafter about program access to be on sufficient notice that the pending bills could affect their bargains.

The Commission is right to be concerned about long-running current contracts foreclosing access, and should stick to its requirement that these agreements be brought into compliance by a certain date.

CONCLUSION

For the reasons set forth above, the Commission should resist so-called *de minimis* blanket exceptions to the program access rules and proceed, instead, to resolve unusual problems through the public-interest proceedings permitted by Section 628(c)(4) of the 1992 Cable Act or by general waiver authority. The FCC should continue to limit grandfathering of non-complying program contracts to the period prior to June 1990, but should clarify its reasoning on presumption of harm in Section 628 complaints.

Respectfully submitted,

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Certificate of Service

I, Ann D. Berkowitz, hereby certify that copies of the foregoing "Opposition of GTE"have been mailed by first class United States mail, postage prepaid, on this 14th day of , 1993 to all parties of record.

Ann D. Berkowitz